

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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ALEEHA DUDLEY, :
 : CIVIL NO. 1:14-CV-38
Plaintiff, :
-vs- : Motion Hearing by Telephone
 :
MIAMI UNIVERSITY, et al., : Wednesday, December 14, 2016
 : 1:38 p.m.
Defendants. : Cincinnati, Ohio

- - -

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN J. DLOTT, JUDGE

- - -

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PROCEEDINGS

(1:38 p.m.)

MS. PENLEY: I'll start over. Thanks so much for calling back.

We're here this afternoon on a conference call in Case Number 1:14CV38, Aleeha Dudley versus Miami University.

I'm just going to read the names that I have, and if I miss your name, then you can please tell me at the end.

For plaintiff, Miss Dudley, I have Kerstin Sjoberg-Witt. Correct?

MS. SJOBERG-WITT: Yes. Yes, that's correct.

MS. PENLEY: For the United States, I have Nabina Sinha. Correct?

MS. SINHA: Correct.

MS. PENLEY: Pearline Hong. Correct?

MS. HONG: Correct.

MS. PENLEY: Matthew Horwitz. Correct?

MR. HORWITZ: Correct. Correct.

MS. PENLEY: For Miami University, I have Elizabeth Smith?

MS. SMITH: Yes.

MS. PENLEY: Erin French?

MS. FRENCH: Correct.

MS. PENLEY: Dan Buckley?

MR. BUCKLEY: Yes.

1 MS. PENLEY: And I also have Mitchell McCrate as
2 deputy general counsel.

3 MR. MCCRATE: That's correct.

4 MS. PENLEY: Okay. For plaintiff, did I miss anyone's
5 name?

6 MR. GOLDSTEIN: You did for plaintiff.

7 MS. PENLEY: Okay. What's your name?

8 MR. GOLDSTEIN: My name is Daniel Goldstein.

9 MS. PENLEY: Okay.

10 MR. GOLDSTEIN: And with me is Sharon Krevor-Weisbaum
11 and Emily Levenson. All of our appearances are entered.

12 MS. PENLEY: Sharon and Emily. Correct?

13 MR. GOLDSTEIN: Correct.

14 MS. PENLEY: Okay. Did I leave anyone else out?

15 (No response.)

16 MS. PENLEY: Okay. I should have Kerstin
17 Sjoberg-Witt, Daniel Goldstein, Emily Levenson, Sharon
18 Krevor-Weisbaum, Nabina Sinha, Pearline Hong, Matthew Horwitz,
19 Elizabeth Smith, Erin French, Dan Buckley, and Mitchell
20 McCrate. Correct?

21 MR. BUCKLEY: Yes.

22 UNIDENTIFIED SPEAKER: Yes.

23 MS. PENLEY: Here in chambers is Judge Susan Dlott,
24 law clerk Jennifer Johnson, court reporter Julie Wolfer.

25 If you could state your name, please, before you

1 speak.

2 THE COURT: I want you to go make a seating --

3 MS. PENLEY: Okay.

4 THE COURT: If you'll all just wait one moment, I want
5 to have Vicki make a copy of the seating chart.

6 And I, while we're waiting for that, first of all, I
7 want to apologize for this taking so long for us to get to this
8 consent decree. Unfortunately, I had a very severe illness
9 that arose suddenly about eight weeks ago, and I've been out.
10 This is my first day back, and so we wanted to get to this as
11 soon as possible.

12 And I want to thank my law clerk Jennifer Johnson for
13 doing so much work on this in the meantime.

14 I also want to clarify one thing with all of you, and
15 that is that the document number 62 that was put on on it looks
16 like August -- it's dated August 19th at the bottom but it says
17 August 22nd where the document number is, that was an entry of
18 dismissal with prejudice, and it was not the best wording in
19 the world and the docket entry which reflects that on the
20 docket sheet is incorrect; and we're going to go ahead and
21 correct that because all that was dismissed at the time, as I
22 understand it, was Aleeha Dudley's claims against Miami
23 University and Dr. David Hodge. The Court retained
24 jurisdiction and the case was still pending of United States of
25 America versus Miami University.

1 Now, if I've got any of that incorrect, let me know
2 now and we'll fix that as well. Any comments on that?

3 MR. GOLDSTEIN: None from Miss Dudley's counsel, Your
4 Honor.

5 THE COURT: Okay. All right. Well, then, next --

6 MR. BUCKLEY: Judge?

7 THE COURT: Yes.

8 MR. BUCKLEY: Judge, this is Dan Buckley. I think
9 there might be an underlying question of either subject matter
10 jurisdiction or whether the case states a claim because there's
11 still this lurking question of whether the DOJ can assert a
12 Title II claim.

13 There's some recent case law -- and by saying all
14 this, Miami is not at all repudiating its agreement and its
15 commitment to settle the case. I am just, as an officer of the
16 court, saying to the Court there may be an underlying question
17 of subject matter jurisdiction that the Court may want us to
18 brief simultaneously or quickly or shortly before we go ahead
19 and proceed with the order. But I want to emphasize Miami is
20 not at all repudiating its agreement. It agreed. It reached
21 the settlement. I just want to raise this as an officer of the
22 court.

23 THE COURT: Okay.

24 MS. HONG: Your Honor, this is Pearline Hong for the
25 United States. Mr. Buckley has framed this as a question of

1 subject matter jurisdiction. But as we informed him earlier
2 this morning, the Supreme Court and Sixth Circuit have
3 unequivocally held that this is not a jurisdictional issue.
4 And even if it were a jurisdictional issue, Your Honor, as an
5 intervenor, the Sixth Circuit has been clear that the United
6 States need not have independent standing in order to bring
7 forward its claims. This Court already granted the United
8 States' motion to intervene well over a year ago, and at this
9 point Miami has waived any objection for statutory standing,
10 our standing to bring suit under Title II of the ADA.

11 If the United States lacks statutory standing, the
12 Sixth Circuit has held that the proper course is to dismiss for
13 failure to state a claim, and Miami did not file a 12(b)(6)
14 motion in this case and its time to do so has passed.

15 THE COURT: Okay.

16 MR. BUCKLEY: Judge?

17 THE COURT: Yes.

18 MR. BUCKLEY: Just briefly, I don't want to -- I'm not
19 even angry. I'm not -- I'm just -- the Sixth Circuit case
20 simply holds that the Title II standing question is one of
21 statutory standing, not jurisdictional standing. It's a murky
22 distinction that you'll find muddy throughout the law. And all
23 I am doing, I'm not really fighting, I am really saying because
24 federal courts are courts of limited jurisdiction, before we
25 all go forward with an important document, a consent decree, I

1 want to know about this jurisdictional issue.

2 MS. HONG: And so, Your Honor, in Lexmark
3 International, a 2014 Supreme Court case, the Court said that
4 this -- the question this case presents is whether the
5 plaintiff falls within the class of plaintiffs whom Congress
6 has authorized to sue under the statute. In other words, we
7 ask whether the plaintiff has a cause of action under the
8 statute.

9 The Court then went on to say that the term "statutory
10 standing" is misleading because, you know, we're not talking
11 about jurisdiction at all. This is not a jurisdictional issue.
12 The Sixth Circuit has in several cases affirmed that principle.

13 In Roberts v. Hamer, a 2011 decision, the Sixth
14 Circuit said: "This case concerns statutory standing, an issue
15 we find to be a matter of statutory construction, not
16 jurisdiction."

17 The Court then went on to say that: "Where a plaintiff
18 lacks statutory standing to sue, her claim should be dismissed
19 for failure to state a claim, not for lack of subject matter
20 jurisdiction."

21 THE COURT: Okay. Does that satisfy you, Mr. Buckley?

22 MR. BUCKLEY: I'm not -- I don't -- I'm -- Judge, I'm
23 willing to submit a one-page memo on this or something like
24 that. I don't want to have an oral argument on the point. I'm
25 thinking -- I'm doing what I'm doing as I think a good lawyer

1 raising this to the Court. The question of statutory versus
2 subject matter jurisdiction is not all that simple. "Murky" is
3 the word. And I thought the Court ought to have an opportunity
4 to consider it before it enters the order. That's all I'm
5 doing.

6 THE COURT: Okay. Let me put you on hold for just a
7 moment.

8 (Off-the-record discussion.)

9 THE COURT: All right. Counsel, this what Mr. Buckley
10 has had to say is sort of out of left field for me because my
11 impression was that, you know, we had an agreement. We were
12 going to go forward with the agreement. The only thing that
13 the Court was questioning was, frankly, the way some of the
14 terms are identified because I don't want to get this case back
15 quibbling about what was meant in the agreement by certain
16 language.

17 I am satisfied going forward. If you're not,
18 Mr. Buckley, then I guess we need to do something about that.
19 I don't know if, you know, if you want to insist on filing
20 something, you can, and the U.S. can respond. It's going to
21 delay this.

22 MR. BUCKLEY: I don't want to delay it, Judge; you
23 know I don't.

24 THE COURT: All right. Then why don't we just go
25 ahead with our comments on the consent decree because I would

1 really -- I feel bad that my illness has caused this not to go
2 on sooner, and I would really like to finally get it done for
3 the parties.

4 All right. Are we ready for comments, then?

5 Let me have Jennifer just go through some of the
6 things -- some of the terms that we felt, you know, that the
7 definitions may not be real clear just because, you know, we
8 want to -- we want to make this agreement as bulletproof as
9 possible for everybody.

10 MS. JOHNSON: Okay. Hi, everyone. Judge asked me to
11 just run through our list.

12 So the overall concern we had was consistency in
13 terms. Specifically, the language "qualified student with a
14 disability," "qualified individual with a disability," "student
15 with a disability, students with a disability." We just wanted
16 to make sure that whomever you're talking about the consent
17 decree applying to is clear. And we thought, you know, we
18 didn't think that was a deliberate thing, we thought maybe it
19 was an oversight, but that you may want to go back through the
20 agreement and make sure that you're using consistent language
21 and you're defining what that means, "qualified student with a
22 disability," or if you want the language to be "a qualified
23 individual with a disability."

24 So I'm going to go ahead and point out in the consent
25 decree where we saw some terms that maybe could use some

1 clarification or were inconsistent.

2 Do you want to put them on hold?

3 MS. PENLEY: Yes.

4 MS. JOHNSON: One second, please.

5 (Off-the-record discussion.)

6 MS. JOHNSON: I'm sorry, everyone. We had an
7 unexpected visitor very briefly.

8 THE COURT: Judge Barrett dropped in for a quick kiss
9 and four Snickers bars.

10 MS. JOHNSON: Okay. So I'll pick up where we left
11 off.

12 So like I was saying, we thought that perhaps one
13 term, one uniform saying, should be used in the places that I'm
14 about to point out and that whatever it is is up to you. We
15 just wanted to make sure it's clear what that means.

16 MR. GOLDSTEIN: Judge, this is Dan Goldstein. If I
17 could interject for just a second.

18 THE COURT: Sure. Go ahead.

19 MR. GOLDSTEIN: I think part of the question was some
20 of these things were for only the students; some refer to staff
21 and other people in the college community, either with or
22 without students; and some such as people who are applicants or
23 otherwise not members of the community, when it's a question of
24 their access, that is a third category. So I think you may
25 find there's a method to the inconsistency.

1 THE COURT: Which is fine with us if -- that's all we
2 want to know is if there is a method. If there's a method and,
3 you know, no one's going to have a disagreement later about,
4 you know, what these terms mean in each of the places where
5 they're mentioned, that's fine with us. We just wanted to
6 point it out and make sure you're aware of it. But what, you
7 know, what you say makes perfect sense that there was -- there
8 was a reason for all of this, and that's all we wanted to
9 double-check.

10 MS. JOHNSON: Yeah. So if there's a method to it,
11 that's fine.

12 One thought might be to -- I don't know if you had
13 considered defining the word "qualified" or "disability." I
14 don't recall seeing them defined. But that could be something
15 that's pretty broad and open for interpretation later, and so
16 just food for thought if it hasn't been considered.

17 So I'm going to go ahead and proceed through the
18 comments that we have, and we can address if you have logic to
19 what you're doing, that's fine, but we just wanted to point out
20 things that jumped out to us.

21 So we'll start with page six. Page six, paragraph 20,
22 line one, this is where we first saw "qualified individuals
23 with disabilities," and we weren't sure if you wanted to define
24 what that means.

25 THE COURT: And anybody, if you want to -- any

1 comments you've got to make, you know, please feel free to
2 interrupt. Just identify who's speaking when you do.

3 MS. SINHA: Sure. This is Nabina Sinha for the United
4 States. So I'll just quickly address that.

5 So that's language, "qualified individual with a
6 disability" is language that comes from the ADA itself. So I
7 don't think we considered defining it but assumed that to the
8 extent it needs to be defined, we could relate it back to the
9 statute itself.

10 THE COURT: Okay.

11 MS. JOHNSON: Yeah, I figured it came from the
12 statute, but that might be something that's worth putting in
13 the actual document so that we can -- if we're -- if the Court
14 is in the position of having to interpret something that's
15 happening, we can safely rely upon ADA case law, for example,
16 for what that might mean.

17 MS. SINHA: Understood. And that's something that the
18 parties can think about.

19 MS. JOHNSON: Okay. The next time we noticed that was
20 page seven, paragraph C, and, again, I'm just pointing this
21 out, "qualified student with a disability."

22 Page ten, paragraph C 25, line two, we didn't see
23 where "LMSs" were defined and we weren't sure what that meant.
24 There's some technical terms that we just weren't familiar
25 with, such as "WC3," "WCAG 2.0."

1 MR. MCCRATE: "LMS" is defined on page four, paragraph
2 12.

3 MS. JOHNSON: Okay.

4 MR. MCCRATE: That was Mitchell McCrate. Sorry.

5 THE COURT: I'm sorry, who was that?

6 MR. MCCRATE: Mitchell McCrate.

7 THE COURT: I'm sorry, page four -- oh, there you are.
8 Paragraph 12?

9 UNIDENTIFIED SPEAKER: Yes.

10 MS. JOHNSON: Okay. Great.

11 THE COURT: Great.

12 MS. HONG: And this is Pearline Hong for the United
13 States. "W3C" and "WCAG" are defined at page six, paragraph
14 21.

15 MS. JOHNSON: Okay. Great.

16 THE COURT: Good.

17 MS. JOHNSON: Okay. And that same paragraph 25 also
18 has the language "student with a disability," which was
19 different, we noticed, than -- because it didn't include the
20 word "qualified." So we're pointing that out to you.

21 Page 11 similarly uses the language, "students with a
22 disability," in paragraph 28. And, you know, we weren't sure
23 with the consistency if you wanted to use the term "qualified."

24 Page 18 --

25 THE COURT: If you want to put on the record as we're

1 going along the reasons for this, it might be helpful if we
2 later have a -- have to have a hearing about it.

3 Anybody want to explain why you don't have "qualified"
4 within paragraph 28 there?

5 MS. SINHA: Yes. So this is Nabina Sinha for the DOJ.
6 And, again, it's just that we were seeking to not impose the
7 ADA definition. So "qualified" comes from the ADA and has a
8 particular meaning. And when we were -- and in the ADA, it's
9 individuals, qualified individuals with disabilities, and we
10 didn't want to import any additional limitation on the
11 definition or the universe of students with disabilities.

12 So we don't think that "qualified" is really necessary
13 when we're talking about students with disabilities. I do
14 recognize that that's, you know, on the face of it that's a
15 distinction.

16 MS. JOHNSON: So are you saying that in all instances
17 where you use the word "student," you -- the word "qualified"
18 doesn't need to be in there, or just in this Textbook and
19 Course Material Accessibility it's unnecessary to say
20 "qualified"?

21 MS. SINHA: That it's unnecessary to say "qualified."

22 MS. JOHNSON: Okay. All right. Page 18, F.32a,
23 again, "qualified individuals with disabilities." We're just
24 noting the different language there.

25 MS. SINHA: Yes. And I think that makes sense with,

1 you know, our method of sort of distinguishing between all
2 individuals with disabilities versus students with disabilities
3 versus other types of categories.

4 MS. JOHNSON: Okay. Page 22, you had helpfully
5 pointed out that a lot of the acronyms were defined previously.
6 I know "DAISY" was.

7 So, let's see, paragraph sub six and sub seven have
8 some acronyms in them, and we just wanted to be sure that they
9 were defined.

10 MS. SINHA: So this is Nabina Sinha from DOJ. We're
11 flipping through ourselves. So some of these acronyms are --
12 are technical in nature, and I don't know actually that they
13 are all defined.

14 MS. HONG: This is Pearline Hong for the United
15 States. "ATAG," "WAI-ARIA," "WCAG2ICT," all of those are
16 defined on page 12. "MathML" is also there.

17 THE COURT: Okay.

18 MS. JOHNSON: Does that cover all of the acronyms,
19 then?

20 MS. HONG: Yes. They're all covered on page 12 and
21 then on page -- excuse me for one second -- page six.

22 THE COURT: Okay.

23 MS. HONG: And I believe that covers it.

24 MS. JOHNSON: Okay. Great. Thank you.

25 And then lastly, page 37, paragraph 64, "qualified

1 individuals with disabilities" is used.

2 MS. SINHA: So this is Nabina Sinha with DOJ. Yeah,
3 and that was an intentional use there.

4 MS. JOHNSON: Okay.

5 THE COURT: Okay.

6 MS. JOHNSON: That's everything, I think.

7 THE COURT: Okay. That's everything we've got.

8 I don't know if anything, you know, that we've raised
9 today makes you want to make any changes in the agreement. It
10 doesn't seem like it does. Correct me if I'm wrong. If not,
11 the Court's willing to go ahead and sign it.

12 MR. BUCKLEY: Judge, this is Dan Buckley again. Do
13 you want to -- do you want to just -- I can get it to you by
14 letter this afternoon, the case law on this jurisdictional as
15 opposed to statutory issue, or do you just -- are you ready to
16 do it? I mean, there's a recent case from the Southern
17 District of Florida. There's some -- I'm not just speaking
18 through my hat.

19 MS. HONG: Your Honor, for --

20 THE COURT: Who's speaking? Wait, wait. Who's
21 speaking?

22 MS. HONG: I apologize. This is Pearline Hong for the
23 United States. For over 50 years, the United States has been
24 enforcing statutes like the ADA, civil rights statutes that are
25 based on Title VI of the Civil Rights Act, and this is the very

1 first case, this case from the Southern District of Florida, in
2 which a District Court has ever held that the United States
3 lacks standing to pursue a Title II claim.

4 I think that the Supreme Court and Sixth Circuit case
5 law is very clear that this is not a jurisdictional issue. And
6 in any event, the unique circumstance of the United States'
7 intervention in this suit as opposed to initiation of a suit on
8 its own means that the United States does not even need to have
9 independent standing, as we argued in our briefing last year.

10 THE COURT: I would agree with Miss Hong.

11 Mr. Buckley, if you feel compelled to file something,
12 you know, I will hold off doing that. I think -- I'll hold off
13 signing the consent decree. I then think then that Miss Hong
14 should put something on the record in response to that.

15 MR. BUCKLEY: What I'm going to do, Judge, I'll just
16 send you a cite -- a letter --

17 THE COURT: No, you've got to file. Whatever you do
18 has got to be of record.

19 MR. BUCKLEY: I know. I'm prepared to have this of
20 record. And I'm -- do you want it in a memorandum form? Do
21 you want it -- I'm willing to do it in correspondence with a
22 couple of brief citations, and then Miss Hong can launch a
23 17-page rebuttal. It's recent law.

24 MR. GOLDSTEIN: Your Honor, this is Mr. Goldstein. If
25 I may interject because we have an interest in this outcome as

1 well. Miss Dudley is a party to the agreement.

2 THE COURT: Right.

3 MR. GOLDSTEIN: I understood, I thought I understood
4 Mr. Buckley to say that he was only discharging his duty as an
5 officer of the court to make the Court aware, which he has done
6 and done on the record since I understand that this is in a
7 transcript, and it seems to me that that's getting stretched a
8 little bit.

9 But if it's going to be in writing, then if it's not
10 in the context of a motion, I don't know that there's any
11 action for the Court to take. I think at this point, frankly,
12 Mr. Buckley should either move to dismiss or say, well, I've
13 discharged my duties as an officer of the court.

14 I'm puzzled, frankly, by the "I'm not repudiating this
15 but" --

16 MR. BUCKLEY: Here's what -- wait a minute.

17 THE COURT: Wait, wait, wait. Let him finish.

18 MR. BUCKLEY: I'm sorry.

19 MR. GOLDSTEIN: That's all right. I'll stop there. I
20 think I've made my point.

21 THE COURT: No, and I agree with you, Mr. Goldstein.
22 I think the only appropriate way to bring a matter to the
23 Court's attention is in the form of a motion.

24 MR. BUCKLEY: Okay. I have raised what I think a
25 lawyer is supposed to do when there is a question of

1 jurisdiction. There's a recent case in the Southern District
2 of Florida. I am not going to move and extend this and turn it
3 into briefing. I'm willing to give the citation, if the Court
4 wants it. If the Court doesn't, I'm done.

5 THE COURT: No, the Court really doesn't want it. If
6 it's not going to be in the form of a motion addressed to the
7 Court and responded to by opposing counsel, then I really don't
8 think it's appropriate.

9 MR. BUCKLEY: Okay. Thank you.

10 THE COURT: All right. So let me ask everybody, then,
11 is it okay to go ahead and sign the consent.

12 Is it okay for the Court to go ahead and sign the
13 consent decree? Any opposition to that at this point?

14 MS. HONG: This is Pearline Hong for the United
15 States. No opposition, Your Honor.

16 MS. SMITH: This is Elizabeth Smith from Miami
17 University. No opposition.

18 MR. GOLDSTEIN: This is Dan Goldstein on behalf of
19 Miss Dudley. No opposition, Your Honor.

20 THE COURT: Okay. Have we got everybody, all the
21 parties?

22 All right. I will get the decree on today.

23 I want to congratulate all of you for doing an amazing
24 job really on this consent decree. I know how much work
25 everybody put into this case, and, you know, I think it will

1 benefit a whole lot of other universities in the future. In
2 fact, the president of Xavier University, I mentioned this to
3 him, and he asked me if I would send him a copy of the decree
4 once it was signed. So I hope it has a widespread effect.

5 And I want to thank you all for everybody's patience
6 in working through this.

7 Anything further?

8 MR. GOLDSTEIN: Yes, Judge, from Mr. Goldstein. I
9 want to say that we, first of all, I appreciate tremendously
10 the comments you've just made, and we hope very much that it
11 serves as a guide and reduces the amount of litigation that
12 anybody has to do going forward at other schools.

13 Also it was disturbing and alarming to hear that you
14 were out for eight weeks, and I hope that you've had a full
15 recovery and have a wonderful holiday season and 2017 and
16 onward. We've appreciated very much your efforts in this case.

17 THE COURT: I appreciate that. I've still got a
18 number of treatments to go, but, you know, hopefully everything
19 will come out all right.

20 I probably should have been smart enough to take
21 senior status two years ago. Now Judge Sargus and I have
22 decided we may have to die on the bench.

23 MR. GOLDSTEIN: And, Judge, I wanted to tell you also
24 that Miss Dudley made the dean's list this quarter at her first
25 quarter at Louisiana Tech University.

1 THE COURT: Oh, that's wonderful. Give her our
2 congratulations.

3 And thanks, everybody.

4 MR. BUCKLEY: Thank you, Your Honor.

5 UNIDENTIFIED SPEAKER: Thank you.

6 MR. HORWITZ: Thank you very much, Your Honor.

7 THE COURT: Bye-bye.

8 (Proceedings concluded at 2:09 p.m.)

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10
11 C E R T I F I C A T E

12 I certify that the foregoing is a correct transcript
13 from the record of the proceedings in the above-entitled
14 matter.

15 s/Julie A. Wolfer
16 Julie A. Wolfer, RDR, CRR
17 Official Reporter
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